OOI CHENG CHENG v. AXA AFFIN GENERAL INSURANCE BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
ABANG ISKANDAR JCA
MARY LIM JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-2346-11-2017]
6 DECEMBER 2018

INSURANCE: *Policy – Liability – Repudiation of liability by insurer – Deceased bought insurance policy for cancer – Deceased diagnosed with cancer and later passed away – Insurer repudiated claim for monies under policy by deceased's wife – Allegation that deceased's cancer started within three months after policy was incepted – Whether deceased knew of cancer when he bought insurance policy – Whether deceased covered by insurance policy – Whether deceased's wife entitled to monies claimed for under insurance policy – Whether insurer could repudiate claim and liability under insurance policy*

The appellant's husband ('the deceased') bought an insurance policy known as 'Cancer Plus Plan 150k' ('the policy') which took effect since 1 November 2012. Under the policy, when an insured is diagnosed with cancer, the sums insured shall become payable 120 days from the effective date. The deceased was diagnosed with lung cancer on 3 April 2013 and passed away on 4 June 2013. The appellant proceeded to pursue a claim for RM150,000 under the policy. However, the respondent repudiated the claim, by virtue of cl. 3.1(b) of the policy, on the ground that the symptoms of the deceased's lung cancer started around January 2013, within three months after the policy was incepted. The appellant, in her capacity as the administrator and representative to the deceased's estate, commenced an action at the High Court, (i) seeking a declaration that cl. 3.1(b) of the policy was void and unenforceable as it was against public policy, the law and equity; and (ii) claiming for RM150,000 under the policy. The High Court dismissed the appellant's action on the grounds that (i) the appellant failed to prove that the deceased did not buy the insurance by misrepresentation, fraud, duress, undue influence and cheating; (ii) the parties were bound by the terms of the contract and it was not open for the appellant to say cl. 3.1(b) of the policy was unfair or against public policy; and (iii) based on medical evidence, the signs and symptoms of the underlying advanced lung cancer suffered by the deceased was present and noted within the period of 90 days from the time the deceased was first covered. Hence, the present appeal which was limited to the appellant's claim as per the policy terms only with other incidental orders.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) A plain meaning of cl. 3.1(b) of the policy would mean that the deceased knew that he had cancer or, at least, when he approached for medical assistance for any ailment, he knew that he had the symptoms or asked to do tests or received medication for cancer. The key word is 'cancer'. If he was treated or suspected of tuberculosis ('TB') and tested for the same, although the coughing symptoms in TB cases may also attract one to suspect other ailments like cancer, this might not be sufficient. The *contra proferentem* rule would assist the appellant in the construction of cl. 3.1(b) of the policy. Clause 3.1(b) of the policy would not be attracted because none of the paramedicals, such as the lab assistants or the doctors who attended to the deceased during the period complained of, knew that the deceased's ailment had anything to do with cancer. Neither did the respondent adduce evidence of any person who had attended to the deceased within the 90 days inception of the policy to deal with any issues related to cancer. (paras 10-12)

(2) The date of inception of the policy was 1 November 2012. The deceased was only diagnosed with cancer on 3 April 2013, which was more than 120 days from the inception. There was no evidence to show the deceased had any knowledge of anything to do with cancer within the meaning of cl. 3.1(b) of the policy. (para 14)

(3) The evidence of the appellant's main witness ('PW1') was clear that the deceased's, *inter alia*, ailment, diagnosis and treatment within the said 90 days had nothing to do with cancer. In addition, there was no positive evidence of any kind, by the deceased, to show otherwise to reject the policy. PW1's evidence had strong probative force and was consistent with the appellant's case as he had attended to the deceased during the period in question. All the medical reports and PW1's evidence did not reflect the elements stated in cl. 3.1(b) of the policy, in particular, for the respondent to deny liability. The respondent did not call any medical witness but relied on the medical report by one Dr Yuvaraj Malhotra whose evidence was only opinion evidence. Dr Yuvaraj Malhotra's observation after the event had no relevance in construing cl. 3.1(b) of the policy. (paras 13 & 14)

Bahasa Malaysia *Headnotes*

Suami perayu ('si mati') membeli satu polisi insurans yang dikenali sebagai 'Cancer Plus Plan 150k' ('polisi tersebut') yang berkuat kuasa sejak 1 November 2012. Bawah polisi ini, apabila seorang pengambil insurans didiagnosis menghidap barah, jumlah yang diinsurans perlu dibayar dalam masa 120 hari dari tarikh kuat kuasa. Si mati didiagnosis menghidap barah paru-paru pada 3 April 2013 dan meninggal dunia pada 4 Jun 2013. Perayu terus menuntut RM150,000 bawah polisi. Walau bagaimanapun, responden menolak tuntutan perayu, bawah kl. 3.1(b) polisi, atas alasan gejala-gejala

barah paru-paru si mati bermula pada Januari 2013, tiga bulan selepas polisi bermula. Perayu, dalam kapasitinya sebagai pentadbir dan wakil estet si mati, memulakan satu tindakan di Mahkamah Tinggi, (i) memohon perisytiharan bahawa kl. 3.1(b) polisi terbatal dan tidak boleh berkuat kuasa kerana bertentangan dengan polisi awam, undang-undang dan ekuiti; dan (ii) menuntut RM150,000 bawah polisi. Mahkamah Tinggi menolak tindakan perayu atas alasan (i) perayu gagal membuktikan si mati tidak membeli insurans secara salah nyataan, penipuan, paksaan, pengaruh tidak wajar dan perdayaan; (ii) pihak-pihak terikat dengan terma-terma kontrak dan perayu tidak boleh mengatakan kl. 3.1(b) polisi tidak adil atau bertentangan dengan polisi awam; dan (iii) berdasarkan keterangan perubatan, tanda-tanda dan gejala-gejala barah paru-paru peringkat serius yang tersembunyi, yang dihidapi oleh si mati, ada dan dikesan dalam masa 90 hari dari masa si mati dilindungi. Maka timbul rayuan ini yang terhad pada tuntutan perayu berkaitan terma-terma polisi sahaja dan lain-lain perintah sampingan.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Maksud biasa kl. 3.1(b) akan bermakna si mati tahu dia menghidap barah atau, paling tidak, apabila dia mendapatkan bantuan perubatan untuk apa-apa penyakit, dia tahu dia mempunyai gejala-gejalanya atau diminta membuat ujian-ujian dan mengambil ubat untuk barah. Kata kuncinya ialah 'barah'. Jika dia dirawat atau disyaki menghidap tuberkulosis ('TB') dan diperiksa untuknya, walaupun gejala-gejala batuk dalam kes-kes TB mungkin membangkitkan syak lain-lain penyakit seperti barah, ini mungkin tidak cukup. Peraturan *contra proferentem* akan membantu perayu dalam tafsiran kl. 3.1(b) polisi. Klausa 3.1(b) polisi tidak akan berbangkit kerana tidak seorang pun paramedik, seperti pembantu makmal atau doktor yang merawat si mati dalam tempoh yang diadukan, tahu penyakit si mati ada kaitan dengan barah. Responden juga tidak mengemukakan keterangan tentang mana-mana orang yang merawat si mati dalam tempoh 90 hari sejak polisi bermula untuk menangani isu-isu berkaitan barah.

(2) Tarikh polisi bermula ialah 1 November 2012. Si mati hanya didiagnosis menghidap barah pada 3 April 2013, iaitu lebih 120 hari dari tarikh permulaan. Tiada keterangan yang menunjukkan si mati mempunyai apa-apa pengetahuan tentang apa-apa kaitan dengan barah dalam maksud kl. 3.1(b) polisi.

(3) Keterangan saksi utama perayu ('PW1') jelas bahawa, antara lain, penyakit, diagnosis dan rawatan si mati dalam tempoh 90 hari tiada kaitan dengan barah. Tambahan lagi, tiada apa-apa bentuk keterangan positif, oleh si mati, yang menunjukkan sebaliknya untuk menolak polisi. Keterangan PW1 mempunyai kekuatan probatif dan selaras

dengan kes perayu bahawa dia merawat si mati dalam tempoh yang dipersoalkan. Semua laporan perubatan dan keterangan PW1 tidak mencerminkan elemen-elemen yang dinyatakan dalam kl. 3.1(b) polisi, khususnya, untuk responden menolak liabiliti. Responden tidak memanggil mana-mana saksi perubatan tetapi bergantung pada laporan perubatan seorang bernama Dr Yuvaraj Malhotra yang keterangannya cuma keterangan pendapat. Pemerhatian oleh Dr Yuvaraj, selepas peristiwa tersebut, tidak relevan dalam tafsiran kl. 3.1(b) polisi.

Case(s) referred to:
KNK Developments Sdn Bhd & Ors v. Sumbangan Aneka Sdn Bhd [2018] 1 LNS 1385 ***(refd)***
Thornton v. Shoe Lane Parking Ltd [1971] 1 All ER 686 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69

For the appellant - N Ahilan; M/s Ong & Assocs
For the respondent - Gurmukh Singh; M/s Isharidah Ho Chong & Menon

[Editor's note: Appeal from High Court, Pulau Pinang; Appeal No: 22NCVC-59-04-2014 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff (the wife of the deceased) appeals against the decision of the learned High Court Judge who refused to enter judgment for the insurance claim for the sum of RM150,000 pursuant to a 'Cancer Plus Plan 150k' policy, notwithstanding that the deceased was not diagnosed with cancer within 120 days from the inception of the policy for the respondent/insurer to deny liability under the policy.

[2] Learned counsel for the appellant had at the commencement of the appeal informed us that they are limiting their claim as per the policy terms only with other incidental orders.

Preliminaries

[3] At the outset, we must say that the appellant had prayed for two declarations which in our view is not necessary on the facts of the case. The case is primarily related to breach of insurance policy terms. In consequence, we only allowed prayer (c) related to RM150,000 with interests and costs and nothing more.

[4] This case is in essence related to the construction of the terms of the policy and its application to the facts of the case. The relief is related to breach of contract only. It will appear from the pleadings and prayers the

plaintiff had confused the learned judge and in consequence the plaintiff's claim was dismissed. The plaintiff's prayer which is a non-starter except for prayer (c) and interests and costs read as follows:

27. Oleh yang demikian, Plaintif menuntut terhadap Defendan:

(a) satu deklarasi yang menyatakan bahawa klausa polisi insurans Defendan terutamanya yang memperuntukkan bahawa, "We do not pay for claims related to 3.1(b) **cancer for which the insured person gets medical advice, has symptoms, or tests, or received any medication or treatment within 90 days from the date such insured person was first covered under** this policy, (emphasis added) adalah terbatal dan tidak berkesan kerana bertentangan dengan polisi awam dan/atau menyalahi undang-undang dan/atau ekuiti;

(b) satu deklarasi yang menyatakan bahawa semua klausa terutamanya klausa 3.1(b) dalam polisi insurans Defendan tersebut yang bertentangan dengan polisi awam dan/atau menyalahi undang-undang dan/atau ekuti adalah terbatal, tidak berkesan dan tidak boleh dipakai;

(c) RM150,000;

(d) gantirugi sebanyak RM2 juta atau satu jumlah yang dianggap sesuai dan adil oleh Mahkamah:

(i) tekanan mental dan emosi;

(ii) kebimbangan dan kesan psikologi terhadap Plaintif;

(iii) kekecewaan dan kesulitan, dan

(iv) pelanggaran tanggungjawab fidusiari terhadap si mati.

(e) gantirugi teruk (aggravated damages);

(f) gantirugi teladan;

(g) secara alternatif, gantirugi-gantirugi yang diawardkan ditaksir oleh Timbalan/Penolong Kanan Pendaftar;

(h) faedah pada kadar yang ditetapkan mengikut arahan Ketua Hakim Negara atas semua gantirugi yang diawardkan oleh Mahkamah dikira dari tarikh tuntutan dibuat iaitu 31/05/2013 sehingga tarikh realisasi penghakiman sepenuhnya;

(i) kos;

(j) lain-lain perintah atau relief yang dianggap sesuai dan manfaat oleh Mahkamah yang Mulia ini.

Brief Facts

[5] To save court's time, we set out the brief facts of the case and the grounds of the decision of the learned trial judge which were placed in a rudimentary manner before us, which read as follows:

A 1. Wilson Tan Heck Hooi ("the deceased") was the Plaintiff's husband. He bought an insurance policy known as "Cancer Plus Plan 150k" ("the Policy") which took effect since 1 November 2012. Under this policy, when an insured is diagnosed with cancer, after 120 days from the effective date, the sums insured shall become payable.

B 2. The deceased was diagnosed with lung cancer on 3 April 2013 and passed away on 4 June 2013.

3. The Plaintiff pursue a claim for RM 150,000 under the policy.

4. The Defendant repudiate the claim by virtue of clause 3.1(b) of the policy on the ground the symptom of the lung cancer had started around C January 2013, within 3 months after the policy was incepted.

5. The Plaintiff in this suit claims for among others, a declaration that clause 3.1(b) of the policy is void and unenforceable as it is against the public policy, law and equity, and the sum of RM 150,000. 00 under the policy.

D 6. The High Court dismissed the Plaintiff's claim thus this appeal by the Plaintiff.

FINDING OF LEARNED HIGH COURT JUDGE

1. The Plaintiff failed to prove that the deceased bought the insurance by misrepresentation, fraud, duress, undue influence and cheating.
E

2. The parties are bound by the terms of the contract they had signed. It is not open for the Plaintiff to say clause 3.1(b) and other exclusion clauses are unfair or against public policy.

3. The court accepted the report by Dr Malhotra despite he did not testify F in court because his report is based on medical report from General Hospital Sungai Petani and evidence by PW1, Dr Song Wai Leng. The court found that the signs and symptoms of the underlying advanced lung cancer in the client was present and noted within the period of 90 days from the time the insured person was first covered.

G **[6]** The memorandum of appeal reads as follows:

1. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat keputusan berdasarkan penerimaan keterangan pakar Responden iaitu "Medical Review Form" yang disediakan oleh Dr. Yuvraj Malhotra (selepas ini dirujuk sebagai "Medical Review Form tersebut) walaupun:

H

(a) beliau tidak dipanggil sebagai saksi oleh Responden semasa perbicaraan untuk memberi keterangan dan lalu diperiksa-balas oleh Perayu;

(b) beliau adalah seorang pakar yang "bias" dan di bawah pengajian Responden (under the payroll of the Respondent) pada segala masa I yang material;

(c) beliau gagal membuat afidavit mengekshibitkan dan menentusahkan Medical Review Form tersebut;

(d) Medical Review Form tersebut juga gagal memberikan butir-butir kelayakan (qualifikasinya) dan sebagainya.

sebagaimana yang dikehendaki secara mandatori oleh Aturan 40A Kaedah 3, Kaedah-Kaedah Mahkamah 2012.

2. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan tidak mengambil kira Seksyen 114(g) Akta Keterangan 1950.

3. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan menerima "Medical Review Form tersebut" sebagai keterangan pakar di mana Dr Yuvraj Malhotra bukan seorang pakar kanser atau "oncologist" yang pernah merawat dan/atau memeriksa si mati, Wilson Tan Teck Hooi dan oleh itu telah melanggar Seksyen 45, Akta Keterangan 1950.

4. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan menolak keterangan saksi pakar yang disapina oleh Perayu, Dr. Song Wai Leng yang mula-mula telah merawat dan memeriksa si mati sedangkan tidak ada saksi pakar yang dipanggil oleh Responden untuk "rebut" dan/atau menentang keterangan Dr. Song Wai Leng yang mengesahkan bahawa tidak ada atau wujudnya bukti yang menunjukkan si mati telah menghidapi kanser paru-paru atas petanda batuk pada sekitar tempoh masa dari Januari 2013 sehingga Mac 2013.

5. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan gagal mempertimbangkan dan/atau mengambil kira rekod perubatan si mati bahawa beliau pernah menghidapi batuk sebelum Mac 2013 yang tidak ada kena-mengena dengan kanser paru-paru.

6. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat andaian atau kesimpulan bahawa saksi pakar Perayu, Dr. Song Wai Leng telah membuat diagnosis yang salah apabila beliau memberi preskripsi rawatan kepada si mati untuk "pneumonia" pada 5-3-2013, "acute bronchiolitis" pada 11-3-2013 dan "pulmonary tuberculosis (TB)" pada 18-3-2013 walaupun tidak ada atau wujudnya bukti perubatan yang menunjukkan si mati telah menghidapi kanser paru-paru pada ketika itu.

7. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat andaian atau kesimpulan bahawa si mati telah menghidapi kanser paru-paru tahap 1, tahap 2 dan 3 sebelum April 2013 memandangkan pada sekitar tempoh masa dari Januari 2013 sehingga Mac 2013 tersebut tidak ada atau wujudnya bukti perubatan yang dapat mengesahkan bahawa si mati telahpun menghidapi kanser paru-paru tahap 1 atau tahap 2 atau tahap 3.

8. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membentuk "medical opinion" sendiri tanpa bukti perubatan (medical evidence) yang dapat mengesahkan bahawa batuk yang dialami oleh si mati sejak Mac 2013 adalah petanda (symptom) kanser paru-paru yang telah wujud dalam tempoh masa (90) sembilan puluh hari dari tarikh si mati diberi perlindingan insurans pada 1-11-2012.

A 9. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana gagal dan/atau tidak mengambil-kira bahawa klausa pengecualian (exclusion clause) dan/atau kandungannya terutamanya Klausa 3.1(b) polisi insurans tidak dibawa kepada perhatian pembeli polisi, Wilson Tan Teck Hooi, si mati sebelum beliau mengambil keputusan untuk membeli polisi insurans tersebut daripada Responden.

B 10. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana mengambil-kira dan/atau mendapati bahawa klausa pengecualian iaitu Klausa 3.1(b) tersebut telah dibawa kepada perhatian si mati sebelum beliau membeli polisi insurans tersebut daripada Responden yang bertentangan dengan keterangan Responden melalui C transkripnya.

11. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan tidak mengambil kira dan/atau mengguna-pakai "contra proferentum rule" terhadap Klausa 3.1(b) polisi insurans tersebut yang tidak adil, tidak jelas dan bertentangan dengan polisi awam.

D 12. Yang Arif yang terpelajar telah terkhilaf dari segi akta dan undang-undang dengan tidak mengambil kira dan/atau mengguna-pakai Akta Perlindungan Konsumer 1999 terhadap Klausa 3.1(b) polisi insurans tersebut.

13. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-E undang bahawa pihak-pihak adalah terikat dengan terma-terma kontrak polisi insurans memandangkan si mati tidak pernah menandatangani kontrak tersebut dan terma-terma polisi insurans tersebut adalah dikenakan secara satu pihak (unilaterally imposed) dan hanya dihantar kepada si mati dalam tempoh masa empat belas (14) hari selepas pembelian polisi insurans tersebut oleh si mati.

F 14. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira representasi, dorongan dan/atau galakan yang dibuat oleh ejen atau wakil Responden kepada si mati bahawa beliau boleh membuat tuntutan selepas 120 hari pembelian insuran polisi tersebut daripada Responden dengan membuat satu G pemeriksaan badan (body check-up) tidak kira tahap kanser yang mungkin dihidapi oleh si mati pada ketika itu, si mati masih boleh membuat tuntutan kerana laporan perubatan tidak akan menyebut bila seseorang itu menghidapi kanser.

15. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang walaupun Responden telah dimaklumkan oleh si mati H bahawa beliau adalah seorang perokok (smoker), namun demikian Responden masih mendorong, membuat representasi dan/atau menyakinkan si mati masih boleh membeli polisi insurans tersebut daripada Responden dan tidak perlu membuat pemeriksaan badan (body check-up) terlebih dahulu.

I 16. Yang Arif hakim yang terpelajar atas alasan-alasan yang dinyatakan di atas ini sepatutnya tidak harus membuat keputusan tersebut sebagaimana yang diberikan oleh beliau tetapi sepatutnya membenarkan tuntutan Perayu/Plaintif sepertimana dituntut dan dihujahkan.

Jurisprudence Related To Law And Application To The Facts

[7] The central argument of the defendant to deny liability was essentially based on the construction of cl. 3.1(b) which reads as follows:

> 3 What we do not pay for (exclusions and limitations)
>
> 3.1 We do not pay for claims related to:
>
> ....
>
> (b) cancer for which the insured person gets medical advice, has symptoms, or tests, or received any medication or treatment within 90 days from the date such insured person was first covered under this policy.

[8] The clause which the respondent is relying on is subject to two jurisprudential principles related to construction of a term of a contract and the *contra proferentem* rule.

[9] The plaintiff had also *inter alia* anchored the argument on the case of *Thornton v. Shoe Lane Parking Ltd* [1971] 1 All ER 686, to say that the defendant had not explained the exclusion clause and also had relied on the Consumer Protection Act 1999.

[10] In the instant case, in our view a plain meaning of cl. 3.1(b) will mean that the deceased knew that he had cancer or at least when he approached for medical assistance for any ailment, medical assistance or professional help, he knew that he had symptoms or asked to do tests or received medication for cancer. The key word is "cancer". If he is treated or suspected of TB and tested for that though the coughing symptoms in TB cases may also attract one to suspect other ailments like cancer, this may not be sufficient.

[11] Even if we are wrong, the *contra proferentem* rule will assist the appellant/plaintiff to justify our views in the construction of cl. 3.1(b).

[12] On the facts of the case, cl. 3.1(b) will not be attracted because none of the para medical, such as lab assistant or the doctors in attendance who had seen the deceased during the period complained of, knew that the deceased's ailment had anything to do with cancer. Neither did the defendant adduced evidence of any person who had attended to the deceased within the '90 days' of the inception of policy to deal with any issues related to cancer.

[13] The plaintiff's main witness's evidence is clear that the patient's ailment, diagnosis, treatment, etc. within the said '90 days' had nothing to do with cancer. In addition, there was no positive evidence of any kind by the deceased to show otherwise to reject the policy. The learned trial judge has captured and summarised the plaintiff's and defendant's evidence which reads as follows:

> Dr Song Wai Leng (PW1) is a General Practitioner of 22 years. His evidence was the deceased was his patient since 24.8.2000. The last time he had seen the deceased is on 16.4.2013. He knew the deceased was a

smoker. He told the court, on 5.3.2013 the deceased came to see him complaining about his cough for more than two months. He then perform a chest x-ray on the deceased and in his opinion the deceased had right lung pneumonia. On 11.3.2013, again the deceased came to see him as his cough was still persisting. This time, he suspected the deceased was suffering from acute bronchiolitis and prescribed him with oral medicine and symbicortturbohaler. On 18.3.2013, the deceased came to see him (for the 3rd time in two weeks), complaining that his cough had not improved. PW1 then did another chest x-ray on him. The second chest x-ray showed that the intensity of the mottling tissue feature was worse compared to the previous x-ray. He then suspected the deceased had pulmonary tuberculosis (TB) and referred the deceased to the General Hospital in Sungai Petani. On 10.4.2013, the deceased again came to see him complaining about his cough. This witness agree that without the lab report from the lung tissue, the doctors from the hospital thought the deceased was likely to suffer from lung infection. He also agree that the deceased had chronic cough. He also said it is possible that the deceased was suffering from lung infection which subsequently developed into cancer on a later date. When asked to tell when did the deceased started to suffer lung cancer, PW1 said from the hospital report, it is stated that the lung tissue obtained on 3.4.2013 was consistent with adenocarcinoma, a type of lung cancer. He can safely say the deceased suffers from lung cancer on 3.4.2013. The deceased was confirmed diagnosed with stage 4 lung cancer on 21.4.2013, based on medical report prepared by General Hospital Sungai Petani. Finally, this witness says the symptom of persistent cough alone is insufficient to confirm the deceased had a lung cancer.

When cross-examined by the defendant's counsel, PW1 agree chronic coughing is a symptom for lung cancer. He also agree that there are cancer stage 1, stage 2 and stage 3. But he does know how long is each stage. Since the deceased was diagnosed with stage 4 cancer on 21.4.2013 and the cancer has spread to his brain when he died in June 2013, questions were posed to PW1 in the following manner:

Q: And complained of cough which was not resolving since January 2013. I put it to you that he already had cancer in his system. In all probability he already had cancer in his system. Your answer, please?

A: I cannot be sure.

Q: Refer page 17 defendant's bundle. It is the death certificate and the cause of death is cancer brain secondary from lung. Can you explain what this means?

A: That means the cancer from lung already spread to the brain.

Q: Cancer from the lung spread on to the brain. Now is this sort of a process instantaneous or does it take time?

A: It depends.

Q: You are unable to answer that question?

A: Yes, unable to answer.

Q: Now in light of your inability to answer this question, how can you possibly say that he may have had lung infection which developed into cancer on a later date?

A: This is a possibility.

The defendant's sole witness, Teh Yau Kun (DW1) is the Head of the Non Motor Claims Department of the defendant. His testimony is the plaintiff's claim was rejected because the deceased had symptoms of lung cancer within 90 days from the inception of the Policy. It is his evidence that the defendant referred the deceased's case to Dr Yuvaraj Malhotra, Chief Medical Officer of AXA Asia in Hong Kong. Based on Dr Yuvaraj's Medical Review Report dated 3.1.2014, the defendant found that clause 3.1 (b) applied and exclude the defendant's liability. This witness also denied there was misrepresentation or fraud exerted on the deceased.

[14] We have read the appeal records and the able submissions of the parties. After giving much consideration to the respondent's submission, we find that the appeal limited to prayer (c) with interests and costs has merits. Our reasons *inter alia* are as follows:

(a) Prayer (a) and (b) is related to declaration. Declaratory relief is a discretionary relief. This is not a fit and proper case to grant declaration and very importantly when the cause of action for the plaintiff is in substance for breach of the policy terms. (See *KNK Developments Sdn Bhd & Ors v. Sumbangan Aneka Sdn Bhd* [2018] 1 LNS 1385; [2018] MLJU 1281).

(b) The date of inception of the policy is 1 November 2012. The deceased was only diagnosed with cancer on 3 April 2013. That is to say, more than 120 days from inception. There was no evidence to show that the deceased had any knowledge or anything to do with cancer within the meaning of policy terms in cl. 3.1(b) earlier.

The plaintiff's medical witness (PW1) evidence was consistent with the plaintiff's case.

(c) The defendant did not call any medical witness but relied on the report of Dr Yuvraj Malhotra, which was marked as ID which *inter alia* reads as follows:

Medical Inference:

Cancers of Lung typically cause symptoms only when the disease is advanced. The commonest symptoms of Lung Cancers are as follows:

- A "new" Cough, which does not go away (persistent):
- Blood in Cough

- Shortness of Breath (difficulty in breathing)
- Chest Pain or other similar Chest Complaints
- Generalized complaints of weight loss/ tiredness/ fatigue, etc.

Among these, the most common and prominent symptom is a new and persistent cough with or without other symptoms. Lung cancer patients are often symptomatic for many months before presentation, irrespective of their disease stage at diagnosis (Corner J et al 2005). Adenocarcinoma lung is classify as Non-Small Cell cancers which contribute 40% of lung cancer. These cancers normally start secreting substances such as a mucus. It tends to grow slower than other types of lung cancer2. It is not clear which symptoms come earlier than others and this varies with patient to patients. In the current case, I note that the client presented with "Decrease effort tolerance" as on 27/12/2012. Unfortunately, for the client no further review of the cause of this was done. This was followed by "new cough" which the client suffered for more than 2 months before he consulted for first time on 5/3/2013, then on 11/03/2013 and then again on 18/03/2013 before being formally diagnosed of "Lung Cancer" on 02-04/04/2013. It is further noted that this "new and persistent cough" is what also directly lead to further investigations and final diagnosis.

This clearly indicated that two (02) of the most common signs/ symptoms of Lung Cancer, namely "new cough" which does not go away and "shortness of breath" (Decrease effort tolerance) were well noted within the "90 days from the date such insured person was first covered under this policy".

Based on all above facts and medical information's, it is my medical opinion that the signs and symptoms of the underlying advanced lung cancer in the client were present and noted within the period of 90 days from the time the insured person was first covered.

(d) In our view, PW1's evidence has strong probative force as he had attended to the deceased during the period in question. All the medical reports as well as his evidence do not reflect the elements stated in cl. 3.1(b) of the policy in particular, for the defendant to deny liability.

(e) Dr Yuvraj Malhotra's evidence is only opinion evidence and his observation after the event has no relevance in construing cl. 3.1(b) and applying it to the facts of the case.

(f) It is beyond doubt that clause 3.1(b) is not sufficiently wide enough for the defendant's defence to succeed. Further, the plaintiff had objected to the admissibility of Dr Malhotra's report.

[15] For reasons stated above, we took the view that the appeal has merit and in exercise of our powers under s. 69 of the Courts of Judicature Act 1964 – this is a fit and proper case to enter judgment for the plaintiff for the sum of RM150,000 with 5% interest per annum from the date of filing of writ to the date of realisation of the judgment sum and with costs of RM30,000 here and below, subject to allocator. Deposit to be refunded.

We hereby ordered so.